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IN THE
COURT OF APPEALS OF INDIANA

GEORGE L. WALKER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0511-CR-1076
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0503-FA-44252

August 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

George L. Walker appeals his convictions, after a trial by jury, of conspiracy to commit dealing in cocaine, a class A felony; dealing in cocaine, a class A felony; possession of cocaine, a class B felony; and possession of paraphernalia, a class A misdemeanor as well as the sentence imposed by the trial court.

We affirm the convictions and remand.

ISSUES

1. Whether the State rebutted Walker's entrapment defense.

2. Whether prosecutorial misconduct during closing argument requires that Walker's convictions be reversed.

3. Whether the trial court abused its discretion when it admitted audio- and video-recorded evidence.

4. Whether the sentence imposed is inappropriate.

FACTS

In early March of 2005, the Indianapolis Police Department was receiving complaints about drug-dealing in a neighborhood on the west side of Indianapolis. On March 15, 2005, a team of officers was dispatched to the area to engage in a "buy-bust" operation. Officer Bradley Thomas, in plainclothes and an unmarked car, drove around the area. Officer Thomas wore a kel-set device, which transmitted to a recorder monitored by other officers, and had been given $40 in photocopied "buy money." Officer Thomas saw two men in the 2200 block of Walnut Street – later identified as Walker and Percy Harris. As he "drove by," Walker "waved at" him, gesturing for him "to stop." (Tr. 14). Officer Thomas "circle[d] the

block," to appear concerned about possibly "get[ing] robbed" or the presence of "police in the area." (Tr. 15).

When he returned to the street, Officer Thomas "pulled up to . . . Walker" and "asked him if anything was going on." (Tr. 16). Walker responded by asking what Officer Thomas "needed," and Officer Thomas said, "a forty," which is "street terminology" for 40 "dollars in crack." Id. Walker "motioned for" Harris "to come over." Id. Harris "came to the passenger side" of Officer Thomas' car and "tried to get in it" to "take [Officer Thomas] to a dope house to buy dope." (Tr. 17). Officer Thomas said that he would not allow Harris in the car because he had previously been carjacked. Harris then "said he was going to get [Officer Thomas] a forty" because "he didn't have it with him"; Harris "started walking away and he told Mr. Walker to stay there with [Officer Thomas]." (Tr. 18). Officer Thomas watched Harris walk eastbound on Walnut Street to the second corner and then turn northbound – "towards Lentz Park" and out of Officer Thomas' sight. (Tr. 19).

While Harris was gone, Walker talked with Officer Thomas. Officer Thomas observed Harris returning along Walnut Street, but he "went into" a house at 2215 West Walnut. While Harris was in the house, Officer Thomas asked Walker "if [Harris] was getting [Officer Thomas] a peanut," meaning the substitution of a macadamia nut as "a fake piece of crack." (Tr. 20). Walker "said no." Id.

Harris exited the house, "came back to the car and said that the dope man wouldn't give him any dope." (Tr. 20). "Walker then said that he could go get some." (Tr. 21). Officer Thomas offered to "come back later," but "Walker told [him] no, just to wait," "to

hang on that he would get some." (Tr. 21, 47). Walker walked eastbound on Walnut to the first corner and "turned northbound" on Sheffield. Id. Harris "lend [sic] in the window" and "talked to [Officer Thomas] . . . until" Walker returned. (Tr. 21, 22). Walker "came back the same way he went," "walked up to the car," and "handed [Officer Thomas] two (2) baggies" of what appeared to be crack cocaine. (Tr. 22). Officer Thomas "gave [Walker] the forty ($40) dollars" of buy money. Id.

Officer Thomas drove away, "turn[ing] on" his police radio and advising the other officers that he had completed the purchase of crack cocaine. (Tr. 23). Officers stationed nearby had been advised earlier, after Thomas transmitted that information by kel-set, of the descriptions of Walker and Harris. One of those officers, James Martin, drove down Sheffield (the street where Officer Thomas saw Walker turn) and observed Walker in an alley. Officer Martin yelled for Walker to stop. Walker ran, and Officer Martin observed him "ma[k]e a motion" by a truck, "a motion to the rear of the truck, kind of downward like motion, like he was . . . dropping something." (Tr. 135, 136). Walker continued to run until stopped by Officer Frazier. Officer Martin "went back to the area where [he] saw [Walker]" make the hand motion by the truck. (Tr. 136). Martin found Walker's coat lying on the ground and the $40 in buy money lying in the bed of the truck. Walker was arrested, and a crack pipe was found in his pants pocket.

On March 17, 2005, the State charged Walker with conspiracy to commit dealing in cocaine, a class A felony; dealing in cocaine, a class A felony; possession of cocaine, a class B felony; and possession of paraphernalia, a class A misdemeanor. Walker was tried before

a jury September 23 – 24, 2005, and testimony to the foregoing was heard. Over Walker's objection, the audio-recording of the kel-set transmissions was admitted into evidence. Officer Marshall Depew testified that while parked in a vehicle 1½ blocks west on Walnut Street, he had operated a hand-held video camera and recorded the activity on the street while Officer Thomas was interacting with Walker and Harris. This video-recording was also admitted into evidence over Walker's objection. Officer Frazier testified that he had walked down Walnut Street in plain clothes while Walker and Harris were at Officer Thomas' car and saw "what [he] believed to be the completion of the transaction" – when "Walker at the driver's side of the vehicle places his hand into the vehicle and walks away around the same car and then northbound on Sheffield." (Tr. 150). Witnesses testified that children disembarked from a car behind Officer Thomas' during the transaction, and that school buses had also driven by. The parties stipulated that the two baggies given to Officer Thomas by Walker in exchange for $40 contained cocaine, and that the site of the transaction was within 1,000 feet of a park.

During the State's final closing argument, Walker objected to comments suggesting that an acquittal would find that "Officer Brad Thomas lied," and that "it's okay to sell drugs in your city park, and it's okay to sell drugs near children." (Tr. 261). The State withdrew the remarks, and the trial court advised the jury "to disregard those statements." (Tr. 262). When Walker asked for further admonishment in this regard, the trial court did so. Walker argued "the defense of entrapment," (Tr. 247), and the jury was instructed on entrapment. The jury found Walker guilty as charged.

At the sentencing hearing on October 25, 2005, the trial court found Walker's lengthy criminal history and number of convictions constituted aggravating circumstances and warranted an enhanced sentence. It imposed a total sentence of forty-four years.

DECISION

1. Entrapment Defense

Walker effectively argues that the State failed to produce sufficient probative evidence to negate his defense of entrapment. Thus, as Walker correctly notes, our standard of review is the same as applied to other challenges to the sufficiency of the evidence. See Ferge v. State, 764 N.E.2d 268, 270 (Ind. Ct. App. 2002). We consider only the evidence that supports the verdict, and we draw all reasonable inferences from that evidence. Id. We neither reweigh the evidence nor judge the credibility of witnesses. Id. Further, we will uphold the conviction if the record supports it with substantial evidence of probative value from which a reasonable trier of fact could infer that the defendant was guilty beyond a reasonable doubt. Id.

In Indiana, the entrapment defense is defined by statute. Albaugh v. State, 721 N.E.2d 1233, 1235 (Ind. 1999). Specifically, the law provides that it is a defense that

> (1) the prohibited conduct of the person was the product of a law enforcement agent, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and
> (2) the person was not predisposed to commit the offense.

Ind. Code § 35-41-3-9. The defense is rebutted by proving *either* that the defendant's prohibited conduct was not the product of police efforts *or* that the defendant was

predisposed to engage in such conduct. Albaugh, 721 N.E.2d at 1235.

Walker argues that the State failed to rebut his entrapment defense because it failed to present sufficient evidence to demonstrate that (1) Walker's conduct was not due to the persuasion of the police, or (2) Walker was predisposed to sell drugs. We disagree.

The persuasion element of the entrapment defense requires the defendant to demonstrate that "the level of police activity persuasively affected the defendant's free will." Albaugh, 721 N.E.2d at 1235. Walker asserts that "nothing attracted the police to Mr. Walker as a target." Walker's Br. at 5. However, Officer Thomas testified that Walker waved at him and gestured for him to stop. He notes that neither the audio- nor video-tape reflect any wave or gesture by Walker, but this assertion was made to the jury – which weighs the evidence and assesses witness credibility. Walker appears to assert that the fact that Officer Thomas stopped his vehicle constituted "persuasion" for Walker to approach and talk with Officer Thomas, but this also invites us to reweigh the evidence. Finally, Walker's implicit contention that Officer Thomas' query about whether "anything was going on" persuaded Walker to ask him what he "needed," and that the answer "a forty" constituted persuasion fails for the same reason. (Tr. 16). Whether this action was "persuasion" is to be determined by the trier of fact. See Ferge, 764 N.E.2d at 270. Walker's wave and gesture to Officer Thomas, his query about what Officer Thomas "needed," his inclusion of Harris after Officer Thomas mentioned "a forty," his staying with Officer Thomas while Harris was away, and his offer to "go get some" after Harris' apparent effort failed constitutes sufficient evidence for the jury to have determined that Walker's sale of crack cocaine to Officer

Thomas was *not* the product of persuasion by Officer Thomas. (Tr. 16, 21). Further, as we held in Kenney v. State, 549 N.E.2d 1074, 1078 (Ind. Ct. App. 1990), when the defendant flags down a moving vehicle and proceeds to make a drug sale to the occupant of that vehicle, the "question of predisposition is for the trier of fact." Therefore, Walker's claim that he should have prevailed on his entrapment defense must fail.

2. Prosecutorial Misconduct

Walker next argues that he was "deprived . . . of his right to a fair and impartial tribunal and a fair jury trial" by prosecutorial misconduct. Walker's Br. at 9. Specifically, he asserts that during the State's final closing argument, the deputy prosecutor "misrepresented the elements of the crimes," a transgression not remedied by the trial court's "biased and inadequate" admonishment. Id. at 11. We disagree.

As the State correctly observes, although Walker objected at trial to the comments, he did not request a mistrial. Failure to move for a mistrial waives any claim of prosecutorial misconduct on appeal. Dumas v. State, 803 N.E.2d 113, 117 (Ind. 2004). Nevertheless, we consider his argument. Id.

As indicated above, the comments by the deputy prosecutor suggested that an acquittal by the jury would mean the jury found that Officer Thomas "lied" and that "it's okay to sell drugs in your city park, and it's okay to sell drugs near children." (Tr. 261). The State "withdr[e]w" the comments, and the trial court immediately directed the jury "to disregard those statements." (Tr. 261-62). Further, when the deputy prosecutor had finished closing argument, at Walker's request and as he "agreed," it admonished the jury as follows:

> [The deputy prosecutor] during his closing argument probably got a little excited and he said that in order to find them[1] not guilty you must find that Officer Thomas lied. And it's totally at the time it's not true [sic]. You're instructed on what you must find to find the person guilty. If you don't find those things then you must find them not guilty. Also he said that you must find that it's okay to deal drugs by a park and children. Again that's not the issue there. I mean and I we all [sic] understand why it's his job he may (inaudible) that you're not required to find those things so if you do find the defendants are not guilty doesn't mean you found somebody a little (inaudible) or you find that it's okay to do that[;] you just found that the State has failed to meet their burden. With that I'm going to turn you over to the bailiff and commit your deliberations.

(Tr. 265).

As Walker notes, "Prosecutorial misconduct may amount to fundamental error where the defendant is subjected to grave peril and the conduct has a probable persuasive effect on the jury's decision." Walker's Br. at 9, citing Watkins v. State, 766 N.E.2d 18, 25 (Ind. Ct. App. 2005). There is no argument by Walker that the jury was not properly instructed concerning the elements the State was required to prove and its burden of proof. The trial court's ultimate instruction to the jury was to rely on those instructions. Therefore, we find the comments at issue did not subject Walker to grave peril or have a probable persuasive effect on the jury's decision. Id.

3. Admission of Evidence

The trial court has broad discretionary power regarding the admission of evidence, and its decisions are reviewed only for an abuse of that discretion. Moore v. State, 771 N.E.2d 46, 56 (Ind. 2002), cert. denied 538 U.S. 1014 (2003). An abuse of discretion, requiring us to reverse the trial court's decision, "occurs where the trial court's decision is clearly against the

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[1] Walker and Harris were tried together in this trial.

logic and effect of the facts and circumstances before the court or it misinterprets the law." Carpenter v. State, 786 N.E.2d 696, 702 (Ind. 2003).

For admission of a tape-recording made in a non-custodial setting, the foundational requirements are

> (1) that the recording is authentic and correct; (2) that it does not contain evidence otherwise inadmissible; and (3) that it be of such clarity as to be intelligible and enlightening to the jury.

Kidd v. State, 738 N.E.2d 1039, 1042 (Ind. 2000). Whether "these criteria have been met" is a matter within the trial court's "wide discretion." Id.

Walker argues that the trial court abused its discretion when it admitted the audiotape of the transmissions from Officer Thomas' kel-set because the audiotape did not include everything to which Officer Thomas testified at trial and, therefore, "improperly bolstered" his testimony. Walker's Br. at 13. He cites his "rights as guaranteed under the Fifth and Sixth Amendments to the United States Constitution and Article 1, Section 13 of the Indiana Constitution," id., but directs us to no case law in this regard.

At trial, Walker objected to admission of the audiotape based on "Rule 106 . . . the rule of completeness"[2] and that "you can always hear Officer Thomas and you can very seldom hear the completeness of[,] the clarity of the alleged defendants." (Tr. 32). The State affirmed that it would play the complete audiotape, and the trial court held that Rule 106 did not apply "to this situation." (Tr. 33). As to the second concern, the trial court noted that

[2] Indiana Evidence Rule 106 provides that when "a recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other part . . . which in fairness ought to be considered contemporaneously with it."

Walker had not challenged "the authenticity" of the audiotape. (Tr. 32). It cited "the general rule . . . that it can't be so unintelligible that you can't figure out what's going on" and found that the audiotape "meets that test." (Tr. 34). Having listened to the tape, the trial court concluded that voices other than Officer Thomas' were "quiet . . . but not inaudible" and stated that it would require the State "to play it pretty loud." (Tr. 35). Consistent with Kidd, the trial court did not abuse its discretion when it admitted the audiotape.

Walker also argues that the trial court abused its discretion in admitting the videotape over his objection.[3] He again cites only generally to provisions of the U.S. and Indiana Constitutions and no case law. He asserts that the videotape "does not support" the testimony of Officer Thomas "in court," but fails to elaborate in that regard. Walker's Br. at 15.[4] We decline to develop an argument for him and find this matter waived.

[3] At trial, Walker objected to the videotape as "not complete" in that "gaps . . starts and stops" indicated that it did not record everything that happened during the time of the defendants' interaction with Officer Thomas. (Tr. 37). The trial court verified that the defense was not challenging the accuracy of what it did depict and that "the videographer [was] going to be a witness." (Tr. 38). It then applied the "rule for audiotapes . . . that it has to be so garbled and bad that it's unintelligible and of no assistance to the jury" and concluded that the videotape "meets that test." (Tr. 39).

[4] We note that a significant portion of Walker's argument to the jury focused on what "you won't see" on the videotape" and that the jury "can't . . . see everything" that the State alleged to have happened. (Tr. 46, 47).

4. Inappropriate Sentence

Finally, Walker cites Indiana Appellate Rule 7(B) and asserts that the sentence imposed by the trial court, forty-four years, is "unreasonable when taking into consideration the nature of Walker's offense and character." Walker's Br. at 16.

Pursuant to the Indiana Constitution and appellate rules, we may review a sentence, and we may revise that sentence if it is inappropriate in light of the nature of the offense and the character of the offender. Pennington v. State, 821 N.E.2d 899, 903 (Ind. Ct. App. 2005) (citing Article 7, Section 6 of the Indiana Constitution and Ind. Appellate Rule 7(B)). The "nature of the offense" refers to the statutory presumptive[5] sentence for the class of crimes to which the offense belongs; thus, the starting point in our consideration of the appropriate sentence for the crime committed is the presumptive, now advisory, sentence. Id. Here, the forty-three year sentence imposed for the offense of dealing in cocaine as a class A felony is thirteen years greater than the presumptive sentence, but it is also seven years less than the maximum fifty year term. See I.C. § 35-50-2-4. On his conviction of the paraphernalia offense, the trial court sentenced Walker to one year, which is the maximum sentence for a class A misdemeanor. See I.C. § 35-50-3-2. We cannot conclude that the sentences imposed are inappropriate in light of the nature of the offenses.

[5] At the time Pennington was sentenced, the law provided for statutory "presumptive" sentences; subsequently, our legislature amended the law to provide for "advisory" sentences. See I.C. 35-50-2 (amended by P.L. 71-2005, effective July 1, 2005).

The "character of the offender," for the purpose of our review, refers to the general sentencing considerations under Indiana Code section 35-38-1-7.1(a), the balancing of the aggravating and mitigating factors under Indiana code section 35-38-1-7.1(b) and (c), and the other factors left to the trial court's discretion under Indiana Code section 35-38-1-7.1(d). Pennington, 821 N.E.2d at 903. The trial court found aggravating circumstances in this matter "due to prior criminal history." (Tr. 294). The trial court recited the extensive history: his 1975 misdemeanor offense, a subsequent second degree murder conviction, then four separate misdemeanor convictions, followed by a class D felony drug offense. Walker's extensive adult criminal history is a valid aggravating factor under Indiana Code section 35-38-1-7.1(a)(2). The trial court found no mitigating factors. Given the weight of the extensive criminal history and the lack of any mitigating circumstances, we do not find that the sentences imposed are inappropriate in light of the character of the offender.

As indicated above, we read the record to establish that the felony on which the trial court entered judgment of conviction and sentenced Walker was dealing in cocaine. The CCS so indicates. However, the abstract of judgment indicates that the conviction and sentence was on the conspiracy count. Further, the CCS does not reflect that the trial court *vacated* the conspiracy and possession convictions, as appears to have been its intent and as the law requires. See Puckett v. State, 843 N.E.2d 959, 964 (Ind. Ct. App. 2006). Therefore, we remand for the trial court to correct the CCS to indicate that the conspiracy and possession convictions are vacated and to correct the abstract to indicate that Walker's felony conviction and sentence is for dealing cocaine.

In addition, although the trial court stated at sentencing that Walker's felony and misdemeanor sentences were to be "consecutive," (Tr. 294), the CCS and abstract show these sentences to be concurrent. Accordingly, we also remand for correction and/or resentencing as to whether the sentences are to be consecutive or concurrent.

Affirmed and remanded.

RILEY, J., and VAIDIK, J., concur.